



Clashing Rights Under United States Copyright Law: Harmonizing an Employer's Economic Right with the Artist-Employee's Moral Rights in a Work Made for Hire

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LEAD ARTICLE

CLASHING RIGHTS UNDER UNITED STATES COPYRIGHT LAW: HARMONIZING AN EMPLOYER'S ECONOMIC RIGHT WITH THE ARTIST-EMPLOYEE'S MORAL RIGHTS IN A WORK MADE FOR HIRE*

Colleen Creamer Fielkow**

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|----------------------------------------------------------------------------------------------|-----|
| INTRODUCTION | 219 |
| I. MORAL RIGHTS BACKGROUND | 221 |
| A. <i>Moral Rights Theory</i> | 221 |
| 1. <i>Berne Convention</i> | 222 |
| B. <i>The Visual Artists Rights Act of 1990</i> | 225 |
| 1. <i>Identified Rights</i> | 226 |
| 2. <i>Works Created</i> | 230 |
| 3. <i>Individuals Protected</i> | 232 |
| II. WORK MADE FOR HIRE | 234 |
| III. CLASH ILLUSTRATED: <i>CARTER V. HELMSLEY-SPEAR, INC.</i> .. | 241 |
| A. <i>Background</i> | 242 |
| B. <i>District Court Determination</i> | 243 |
| C. <i>Second Circuit Review</i> | 246 |
| IV. ANALYSIS | 250 |
| A. <i>Carter v. Helmsley-Spear: Flawed</i> <i>Application Exposed</i> | 251 |
| B. <i>Reid Factors: A Tailored Approach</i> | 256 |
| C. <i>VARA Revised: Recognizing Moral Rights in Employee-</i> <i>Visual Artists</i> | 260 |
| CONCLUSION | 263 |

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*"A work of art . . . is a form created by the artist out of human experience. At the same time it has a cultural context. It exists in time, and its form reflects the forces of that of that time--social, economic, political, and religious."*¹

INTRODUCTION

It was only recently that United States law recognized the substance of that statement. The copyright protection afforded in this country for most of its existence only recognized the economic, utilitarian purposes of protecting art.² In 1990, the United States joined the world copyright community in recognizing the "moral rights" visual artists have in their creations.³ This right encompasses the personal and spiritual component that an artist embodies in her work.⁴

United States copyright law also recognizes the employer's rights in the creation of copyrightable works. The work made for hire provision of the 1976 Copyright Act⁵ entitles an employer to copyright ownership in a work created and/or produced by its employee-creator.⁶ An employer's ownership right is "entrenched" in United States copyright law to provide financial incentives to create.⁷

Based on the theory that moral rights can only be exercised by a creator of art and that this right exists independently of the economic

1. 136 CONG. REC. 12,609 (1990) (statement of Rep. Markey) (quoting Helen Gardner, arts scholar and historian).

2. Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 1 (1985) (noting the United States "tradition of safeguarding only the pecuniary rights of a copyright owner").

3. Visual Artists Rights Act, Pub. L. No. 101-650, 104 Stat. 5128, 5128-33 (1990) [hereinafter "VARA"] (codified in scattered sections of 17 U.S.C.). VARA only protects moral rights in works of visual art. See *infra* Part I.

4. See Kwall, *supra* note 2, at 7 (describing moral rights as derived from a creator "project[ing] his personality into his work").

5. 17 U.S.C. § 201 (b) (1994).

6. See *infra* Part II.

7. See Kwall *supra* note 2, at 71.

right in exploiting the copyrighted work, both of the following statements *should* be true: 1) An employer of a work made for hire cannot exercise moral rights in the work, but enjoys the economic right in the copyrighted work; and 2) an employee-creator whose work is a work made for hire can exercise her moral rights but cannot enjoy the economic right in the copyright. Under the current interpretation of copyright doctrine in the United States, the first assertion is true but the second is not. The theories suggest that moral and economic rights should live in harmony, but U.S. copyright law demonstrates that these rights clash in a work for hire situation, with moral rights the sacrificed element.⁸

This Article concerns the clash between the work made for hire doctrine and the moral rights doctrine. The consequence of a work for hire determination is especially damaging to an artist's moral rights when the protection of irreplaceable art work from destruction is extinguished based on a finding of an employer-employee relationship. This consequence is illustrated by the recent Second Circuit decision in *Carter v. Helmsley-Spear, Inc.*⁹ where three artists were denied injunctive relief to prohibit the defendant building owners from modifying or destroying the artists' walk-through sculpture in the lobby of defendant's building. The Second Circuit denied relief under the Visual Arts Rights Act (hereinafter VARA or Act), holding that this art was a work made for hire and therefore fell outside of the statutory protection.

The clash of economic rights and moral rights involves two areas of copyright doctrine and, therefore, this Article reviews both doctrines and provides suggestions for harmonizing them. Part I explores the backdrop of moral rights abroad and the recent acceptance of those rights in the United States. Part II reviews the work made for hire provision and the Supreme Court's decision in *Community for Creative Non-Violence v. Reid*.¹⁰ Part III illustrates the essence of the conflict through a review of *Carter v. Helmsley-Spear, Inc.* Part IV analyzes the conflict and recommends ways to

8. See *infra* Part III.

9. 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1824 (1996); see *infra* Part III.

10. 490 U.S. 730 (1989); see *infra* Part II.

harmonize these competing interests.

This Article suggests that the current “Reid Factors” for determining employee status be applied in a more consistent fashion, with an eye towards vindicating the purposes of current U.S. moral rights legislation. However, the ultimate remedy for this clash between the rights of the employer and employee-artist cannot be fully realized with a judicial test and must be addressed legislatively. Thus, the advocated approach is a recognition of moral rights for employee-artists.

I. MORAL RIGHTS BACKGROUND

A. *Moral Rights Theory*

The theory of moral rights, or *droit moral*, distinguishes the economic component of a created work from the embodiment of the creator’s personality in the work.¹¹ Thus, the creator’s economic rights in her work exist independently of her personal rights. It is the protection of the creator’s personal expression and spiritual embodiment within her work which constitute her moral rights.¹²

European and other countries have long recognized the theory of moral rights, although there is no uniform concept between the foreign jurisdictions.¹³ Despite the international inconsistency, the largest international agreement on copyright does attempt to provide a broad provision for moral rights recognition.¹⁴ This agreement, well known as the Berne Convention, provides a model for moral rights and serves as a basis for current U.S. legislation. A brief overview of this international agreement is useful to illustrate the U.S. recognition of moral rights.

11. Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection For Visual Art*, 39 CATH. U.L. REV. 945, 949 (1990). See Kwall, *supra*, note 2, at 5-10 for discussion of the moral right components with accompanying hypothetical.

12. See Damich, *supra* note 11, at 949 (noting that the legal protection of this personal component gives rise to the moral right).

13. Kwall, *supra* note 2, at 9-10.

14. William Belanger, *U.S. Compliance with the Berne Convention*, 3 GEO. MASON INDEP. L. REV. 373 (1995).

1. *The Berne Convention*

The Berne Convention for the International Union for the Protection of Literary and Artistic Works¹⁵ (known as the Berne Convention) currently has 84 members.¹⁶ The Berne Convention's concept of moral rights is found in Article 6*bis*.¹⁷ The language of Article 6*bis* defines a creator's moral rights to include claims of authorship and prevention of distortion or alteration to the creator's work which would damage honor or reputation.¹⁸ Article 6*bis* provides two types of moral rights for creators: the right of attribution and the right of integrity.

A creator's claim to attribution represents her right to attach her name to her work.¹⁹ This right of attribution also works in the converse since it gives the creator the right to anonymity and the right

15. Berne Convention for the International Union for the Protection of Literary and Artistic Works, *reprinted in* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, app. 27 (1996) [hereinafter Berne Convention]. This treaty was opened for signature Sept. 9, 1886, and was last revised in Paris on July 24, 1971. *Id.* at 27-1.

16. MARSHALL A. LEAFFER, INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY (1990). The United States did not become a Berne Convention member until 1988. See *infra* notes 30-33 and accompanying text for the historical background.

17. This concept is defined in Article 6*bis*:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention, *supra* note 15, at 27-6.

18. *Id.*

19. See WORLD INTELLECTUAL PROPERTY ORGANIZATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (Paris act, 1971) (1978) [GUIDE TO THE BERNE CONVENTION]. The official comment to Article 6*bis* states: "This provision enshrines two of the author's prerogatives: first and foremost to claim the paternity of his work -- to assert that he is its creator." *Id.* at 41.

to publish under a pseudonym.²⁰

The right of integrity serves to protect the physical integrity of a creator's work.²¹ Article 6*bis* gives a creator a mechanism to prohibit mutilation or distortion which damages the physical integrity of her work.²² The right of integrity also protects against "other derogatory action" which affects the work and results in prejudice to the creator's "honor or reputation."²³

The text of the Berne Convention indicates a broad scope of works which are covered by moral rights.²⁴ The Berne Convention covers "the rights of authors in their literary and artistic works."²⁵ Although the text provides protection for most works, it also contains language which gives member countries the discretion to narrow the works covered by moral rights.

Article 6*bis* does not address whether moral rights are alienable and/or waivable. Although specific language addressing these issues is absent, commentators have interpreted Article 6*bis* moral rights as inalienable and nonwaivable.²⁶ Others have suggested that the silence

20. *Id.* The official comment to Article 6*bis* continues: "The right of paternity may be exercised by the author as he wishes; it can even be used in a negative way, i.e., by publishing his work under a pseudonym or by keeping it anonymous. . . ." *Id.*

21. See *supra* note 17 for text of Article 6*bis*.

22. *Id.*

23. *Id.*; see Damich, *supra* note 11, at 950-951 (indicating the broad scope of Article 6*bis* mandates not only physical integrity for originals, but also the right of faithful reproduction for paintings, drawings, prints, sculptures, and photographs). But see Kwall, *supra* note 2, at 11 n.39 (noting some scholarly criticism of the limited scope of Article 6*bis* right of integrity). This criticism centers on the prejudice requirement. *Id.*

24. See Damich, *supra* note 11, at 953 (noting that "[n]othing in the text of the Berne Convention indicates that the moral rights of Article 6*bis* do not apply to all works protected by the Convention").

25. See Berne Convention, *supra* note 15, at 27-2. Article 2 of the Berne Convention covers "literary and artistic works." The text covers "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." *Id.*

26. See, e.g., Damich, *supra* note 11, at 967 (finding evidence of inalienability and nonwaivability in the text of Article 6*bis* and the official interpretation of the Berne Convention). Damich refers to the phrase from paragraph one in Article 6*bis* for support: moral rights exist "[i]ndependently of the author's economic rights,

in Article 6*bis* indicates an intention that issues of alienability should be left to the discretion of each member country.²⁷

Article 6*bis* explicitly provides for the duration of moral rights protection for the author. The second paragraph contains language recognizing the existence of moral rights after the death of the author until the expiration of her copyright.²⁸ There is a loophole, however, to compliance. The Article allows member countries to cut off moral rights after the author's death.²⁹

While the United States had remained an outsider to the Berne Convention community for over 100 years,³⁰ it more recently realized the important global future in technology and moved to protect its investments abroad. An important step into the global copyright community for the U.S. was the Berne Convention Implementation Act of 1988 (BCIA).³¹ Although this legislation served to give U.S. membership status, it relied on future domestic legislation to adopt the Berne Convention provisions.³² Such legislation was finally

and even after the transfer of the said rights." Berne Convention, *supra* note 15, at 27-6.

27. See, e.g., Melville B. Nimmer, *Implications of Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 523-24 (1967).

28. Berne Convention, *supra* note 15, at 27-7. Paragraph 2 of Article 6*bis* provides: "The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed." *Id.*

29. *Id.* The loophole provides:

However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

Id.

30. See Belanger, *supra* note 14, at 373, for insight into why the U.S. refused to join the Berne Convention. One reason offered for the self imposed isolation by the U.S. has been the difference between the fundamental philosophical underpinnings of copyright law in common law and civil law countries. *Id.*

31. Pub. L. No. 100-568, 102 Stat. 2853 (1988).

32. See Belanger, *supra* note 14, at 374 (highlighting that a central feature of BCIA "was its declaration that the Berne Convention is not self executing, and thus

passed in 1990 in the Visual Artists Rights Act.³³ As the next section demonstrates, VARA's provisions are a *first* step to compliance with the Berne Convention's concept of moral rights.

B. The Visual Artists Rights Act of 1990

"In the last part of the 20th century, the United States has become the financial, political, and intellectual capital of the world. We also have become the arts capital of the world. With that leading status comes the responsibility for fostering, protecting and encouraging the arts."³⁴ As the above statement suggests, Congress perceived the United States changing role in the world copyright community as necessitating the enactment of VARA. As originally proposed, VARA provided for moral rights protection similar to the concept embodied in the Berne Convention's Article 6*bis*.³⁵ In the end, though, VARA was passed with narrow protections for moral rights.³⁶

In general, VARA provides an author with the rights of attribution and integrity, but only for specific works of visual art.³⁷ These rights are not transferable, although they may be waived by the author.³⁸ The Act limits the duration of the rights to the life of the author,

its implementation depends entirely on domestic legislation").

33. Pub. L. No. 101-650, 104 Stat. 5128, 5128-33 (1990) (codified in scattered sections of 17 U.S.C.).

34. 136 CONG. REC. H8271 (daily ed. Sept. 27, 1990) (statement of Rep. Markey).

35. Senator Edward Kennedy and Representative Robert Kastenmeier introduced two moral rights bills to the 101st Congress. See S. 1198, 101st Cong. (1989); H.R. 2690, 101st Cong. (1990); see also Damich, *supra* note 11, at 951-974 (analyzing these two proposed bills).

36. The Congressional record reflects the attitude many members of Congress had towards moral rights: "[S]o-called moral or artists rights, with their noneconomic, [sic] subjective underpinnings do not fit neatly within our copyright act." 136 CONG. REC. 12,610 (1990) (statement of Rep. Fish). Such sentiment had the overall effect of shaving down the proposed acts.

37. 17 U.S.C. § 106A (1994).

38. 17 U.S.C. § 106A (e). See *infra* notes 61-62 and accompanying text for further discussion.

extinguishing at death.³⁹ There is an additional provision for situations involving a work incorporated into a building.⁴⁰ VARA also has a preemptive effect on state statutes that similarly protect moral rights.⁴¹

The next three subsections explore VARA's significant contours: 1) identified rights; 2) works covered; and 3) individuals protected. Each subsection compares VARA's provisions to correlating provisions in Berne Convention's Article 6*bis*. As one commentator observed, "while recognizing the importance of . . . [VARA], it must be acknowledged that the Act does not bring United States law into conformity with Article 6*bis*."⁴²

1. Identified Rights

The Act recognizes both Article 6*bis* rights to attribution and integrity in certain respects. VARA, in fact, is captioned "Rights of certain authors to attribution and integrity."⁴³

The right of attribution includes the creator's right to claim authorship for her work or disclaim authorship for works she did not create.⁴⁴ This right also permits a creator a cause of action to prevent

39. 17 U.S.C. § 106A (d). In works created before the effective date of VARA that have not been transferred from the author, the moral rights term is the same as the copyright term. *Id.* Article 6*bis* provides, on the other hand, that moral rights exist until the expiration of the creator's economic rights. Berne Convention, *supra* note 15, at 27-7. See notes 28-29 and accompanying text for a discussion of Article 6*bis* and the duration of moral rights.

40. 17 U.S.C. § 113(d); see *infra* notes 68-75 and accompanying text.

41. 17 U.S.C. § 301(f)(2). There are currently 11 states with their own moral right statutes. See ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL Kwall, INTELLECTUAL PROPERTY: CASES AND MATERIALS ON TRADEMARK, COPYRIGHT AND PATENT LAW, 318-361 (1996). VARA preempts a state law action unless it involves a work commenced before VARA's effective date, involves a non-equivalent right, or arises from posthumous violations. Some state statutes provide moral rights protection for the life of a copyright. *Id.*

42. Damich, *supra* note 11, at 947.

43. 17 U.S.C. § 106A (1994).

44. 17 U.S.C. § 106A(a)(1)(A) & (B). The text provides:

(1) [An author] shall have the right --

(A) to claim authorship of that work, and

the use of her name on her work which has been distorted or mutilated and has therefore prejudiced her honor or reputation.⁴⁵

The right of attribution is narrower than the Article 6*bis* right. The major difference between the two rests in the right of anonymity and pseudonymity. Article 6*bis* expressly includes both of these rights in its protection of moral rights.⁴⁶ VARA, on the other hand, only permits an author to prohibit use of her name if she did not create the work or her work has been modified or distorted, thereby prejudicing her reputation or honor.⁴⁷ Therefore, VARA does not recognize a moral right to remain anonymous or use a pseudonym if a work remains unaltered.

The right of integrity has been described as “the most compelling case for moral rights protection” since it protects “irreplaceable works from irreversible physical changes.”⁴⁸ The right of integrity involves two general rights to protect the physical integrity of a work: the right to prevent distortion, mutilation, and modification and the right to prevent destruction of a work.⁴⁹

The right to prevent “distortion, mutilation or other modification”

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

Id.

45. 17 U.S.C. § 106A(a)(2) (1994). The text provides that the author:
(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation;

Id.; see Damich, *supra* note 11, at 958 (observing that the right of attribution--or the right to disassociate one's name from a work--applies whether or not the distortion or modification was intentional). Professor Damich further notes that this right to attribution “is not exactly coextensive with the right of integrity.” *Id.* The right of integrity to prevent modification or destruction only applies to intentional acts.

46. See *supra* notes 19-20 and accompanying text.

47. See *supra* note 45 and accompanying text.

48. Damich, *supra* note 11, at 950. Congress also recognized the vast importance of protecting U.S. art from destruction or modification: “[I]t is paramount to the very integrity of our culture that we preserve the integrity of our artworks as expressions of the creativity of the artist.” 136 CONG. REC. 12,609 (1990) (statement of Rep. Markey).

49. 17 U.S.C. § 106A(a)(3)(A) & (B) (1994).

under VARA applies to any intentional act to a work which would result in prejudice to the author's "honor or reputation."⁵⁰ The provision also provides a right to recover damages for past modifications which are prejudicial.⁵¹

The right to prevent destruction is limited to "intentional or grossly negligent destruction" of a "work of recognized stature."⁵² The right against destruction is broader than the right against distortion, mutilation and other modification in two respects. First, the right against destruction covers grossly negligent acts in addition to intentional acts, although both of these requirements are inconsistent with Article 6*bis*. Second, the right against destruction is also broader than the right against modification because it is not limited to acts which prejudice the author's honor or reputation. However, the right against destruction is limited since it only protects works "of recognized stature."⁵³

This restriction to works recognized as having artistic merit is arguably a divergence from Article 6*bis* and moral rights theory in general.⁵⁴ Although VARA does not define what a "work of recognized stature" is, the legislative history suggests a court should make this quality determination by reviewing opinions of art experts.⁵⁵ Congress probably added the artistic merit requirement to

50. 17 U.S.C. § 106A(a)(3)(A).

51. *Id.* The text provides: "and any intentional distortion, mutilation, or modification of that work is a violation of that right." See Damich, *supra* note 11, at 961-962 for support of this interpretation.

52. 17 U.S.C. § 106A(a)(3)(B). The text provides: "to prevent any destruction of a work or recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right." *Id.*; see Damich, *supra* note 11, at 962 (noting that "intentional or grossly negligent destructions are ipso facto violations of the right").

53. 17 U.S.C. § 106A(a)(3)(B).

54. See Damich, *supra* note 11, at 962 (finding this limitation "inconsistent with moral rights theory, the Berne Convention and the United State's copyright law tradition of refraining from judgments as to quality").

55. See Senate Bill 1198 which stated:

[A] court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, conservators of recognized stature, and other persons involved with the creation, appreciation, history, or marketing of

prevent nuisance law suits.⁵⁶ One commentator noted that despite the potential for nuisance suits, this requirement “is so opposed to moral rights theory” that it is not “an appropriate solution.”⁵⁷

Despite the quality assessment necessitated by this “recognized stature” requirement, it must be noted that Article 6*bis* does not mention the right against destruction.⁵⁸ One commentator noted that this omission should not “justify cutting down the right of integrity” to only include the right against distortion or mutilation.⁵⁹ It could therefore be argued that the Act is not inconsistent with Article 6*bis* since VARA addresses an act (destruction) not expressly mentioned by the Berne Convention.⁶⁰

Despite the recognition of the moral rights of attribution and integrity, VARA provides that these rights may be waived by the artist. The written waiver must specify the work, the uses the waiver applies to and it must be signed by the author.⁶¹ Although Article 6*bis* is silent on whether moral rights are waivable, it has been interpreted to prohibit waivers in order to protect the artist “from

works of recognized stature. Evidence of commercial exploitation of a work as a whole, or of particular copies, does not preclude a finding that the work is a work of recognized stature.

S. 1198, 101st Cong. § 3(a) (1989).

56. See Damich, *supra* note 11, at 954-55 (describing such nuisance suits as those arising from the “destruction of a five year old’s finger painting”).

57. Damich, *supra* note 11, at 955 (suggesting that a better solution would be to limit damages to fair market value of the work).

58. Even so, destruction would likely fall under a “derogatory action.” See *supra* note 23 and accompanying text.

59. Damich, *supra* note 11, at 980.

60. See Kwall, *supra* note 2, at 9. Some jurisdictions have not recognized the right against destruction based on an “underlying rationale that a work which has been destroyed completely cannot reflect adversely upon the creator’s honor or reputation.” *Id.* However, some of these jurisdictions are now recognizing that an artist’s honor can be adversely affected by destruction. Namely, France has recently recognized the right against destruction by protecting an author’s right “to have his work continuously and authentically express his personality.” Damich, *supra* note 11, at 980.

61. 17 U.S.C. § 106A(e)(1)-(2) (1994). The original Senate bill did not contain a waiver provision, making moral rights unwaivable. S. 1198, 101st Cong. § 3 (1989).

herself” and from those parties who could exploit her weak bargaining position.⁶²

2. *Works Covered*

VARA explicitly defines which works are protected by moral rights. The Act is primarily protective of unique, irreplaceable works of visual art.⁶³ Visual art under VARA includes paintings, drawings, prints, sculptures, and still photographs. The Act further limits protection to those works which exist in limited editions of 200 copies or fewer.⁶⁴ Visual art does not include works such as useful articles, applied art, motion pictures or other audio-visual work, charts and other technical drawings, books, magazines and other periodicals, advertising items or any work made for hire.⁶⁵

62. Damich, *supra* note 11, at 967 (noting that because artists often have very weak bargaining powers, a waiver provision may result in the elimination of moral rights).

63. The narrow category of works in VARA was a deliberate selection by Congress to preserve fine art. Many members of Congress viewed the narrow category as the maximum concession for moral rights: “This legislation [VARA] should not be viewed as a precedent for the extension of so-called moral rights into other areas.” 136 CONG. REC. 12,610 (1990) (statement of Rep. Fish).

64. 17 U.S.C. § 101 (1994). The definition of visual art:

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or
- (2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Id.; see Damich, *supra* note 11, at 976 (wondering where the number 200 for the limited edition requirement came from). “The figure does not seem to correspond with the exhaustion point of a lithographic stone or metal plate or of a photographic negative . . .” Damich, *supra* note 11, at 976.

65. 17 U.S.C. § 101.

A work of visual art does not include --

- (A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-

The narrow category of works protected by VARA falls short of the concept of moral rights embodied in Article 6*bis*. While VARA protects a specific category of visual art, the Berne Convention provides a broad definition of literary and artistic works covered by Article 6*bis*.⁶⁶ One commentator optimistically noted that despite the narrow scope of VARA's protected works, that "protecting irreplaceable works is a logical starting point" for the United States.⁶⁷

Works that become part of a building are also covered by moral rights.⁶⁸ VARA deals separately with those works incorporated into buildings based on the difficult removal problems that these works pose.⁶⁹ Congress specifically dealt with the removal problem by splitting the VARA provision to cover two situations. The first situation involves works that cannot be removed without mutilating, distorting or destroying the work.⁷⁰ The author's right to integrity to

visual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

...

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

Id.

66. See *supra* notes 24-25 and accompanying text.

67. Damich, *supra* note 11, at 954. But see comments of Representative Fish, *supra* note 63.

68. 17 U.S.C. § 113(d)(1) & (2) (1994).

69. One problem that arises when a work of art is incorporated into a building is that removal of the art work from the building may mutilate or even destroy the work.

70. 17 U.S.C. § 113(d)(1)(A) & (B) provides:

In a case in which --

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or

prevent such removal will not survive if she consented to the installation. The second situation concerns works which can be removed without distortion, mutilation, other modification, and destruction.⁷¹ In this situation the author must assert her right to integrity before her VARA right is implicated.

3. *Individuals Protected*

When one thinks of a sculpture, painting or drawing one thinks of its creator as an "artist." VARA, however, for the purpose of consistency with the Copyright Act, limits moral rights protection to "authors." An author under the 1976 Copyright Act (which VARA is amended to) is an individual, or entity, who is entitled to claim copyright ownership in a work.⁷²

The term author as applied to moral rights can become problematic

in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

Id.; see MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 8D.06(c)(3), at 8D-79-80 (1996).

71. 17 U.S.C. § 113(d)(2)(A) & (B) provides:

(2) If the owner of a building wishes to remove a work of visual art which is a part of such building and such can be removed from the building without the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), the author's rights under paragraphs (2) and (3) shall apply unless --

(A) the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art, or

(B) the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or pay for its removal.

Id.; NIMMER, *supra* note 70, at 8D-79-80.

72. 17 U.S.C. § 102 (1994). Copyright protection is vested in works of authorship that are original and fixed.

since the Copyright Act interprets “author” to include employers.⁷³ An employer is deemed an author of a work made for hire, and thus has copyright ownership in such works incident to employment. Despite the employer’s “economic” rights in copyright, most employers cannot claim moral rights in a work if they did not physically create it. Moral rights can only apply to one whose “personality” was embodied in the art during its creation. In this case, moral rights should vest in the employee who physically created, and often originated and designed, the work. Thus, a problem arises when an employer of a work made for hire owns the copyright in a work and the employee-creator possesses moral rights to her work.

VARA does not address this problem between employers and employees and their respective rights. VARA simply excludes work made for hire from its ambit of protection, thereby extinguishing any moral rights the employee-creator possessed.⁷⁴ More simply stated, moral rights in a work made for hire do not exist for either party under VARA.

VARA’s exclusion of works for hire from moral rights protection is inconsistent with moral rights theory because these rights exist independently from the economic rights of a work.⁷⁵ Despite this inconsistency, the Berne Convention accommodates member countries who recognize the work for hire concept. The Berne Convention allows member countries to make their own rules on the subject of authorship, therefore permitting a corporation or other hiring party authorship status.⁷⁶ Therefore, while U.S. law is not inconsistent with Berne Convention by recognizing works made for hire, VARA is inharmonious with moral rights theory. VARA does

73. 17 U.S.C. § 101. See *infra* notes 78-80 for discussion of the work for hire concept.

74. See *infra* notes 78-80 and accompanying text.

75. Article 6*bis* states that an author keeps her moral rights even after she transfers her economic rights. Berne Convention, *supra* note 15, at 27-6; see Damich, *supra* note 11, at 965 n.95 (noting that French moral rights law does not recognize the concept of work for hire except for computer programs). Even so, a computer programmer under French law still retains her moral rights. Damich, *supra* note 11, at 965 n. 95.

76. GUIDE TO THE BERNE CONVENTION, *supra* note 19, at 93.

not recognize the personal moral rights in an employee-artist of a work made for hire while moral rights theory recognizes an artist's moral rights even after she transfers her economic rights.

Therefore, an artist's status as an independent contractor, as opposed to an employee, under a work made for hire determination is crucial to recognizing and protecting her moral rights under VARA. One commentator has noted that VARA's failure to protect moral rights in this situation stems from the policy of awarding control of the creative process to the "one who is bearing the financial risk" of the work.⁷⁷ The next section gives an overview of the statutory basis for works made for hire and the Supreme Court's interpretation of the factors relevant to defining an employment relationship.

II. WORK MADE FOR HIRE

A work made for hire is created for an employer or other person who commissioned such work. For purposes of the Copyright Act, this employer or individual who commissioned the work is considered the "author" and entitled to the economic benefits from the exploitation of the copyrightable work.⁷⁸ While the legislative

77. Damich, *supra* note 11, at 988.

78. The Copyright Act defines works made for hire:

Works Made For Hire-- In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C. § 201 (b) (1994). The constitutionality of the work for hire concept has been defended as consistent with the policy behind the copyright protection. See Anne Marie Hill, Note, *The "Work for Hire" Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works*, 74 CORNELL L.REV. 559, 579 (1989) (noting "[b]ecause the work for hire employer conceives of the project, instructs the employee, participates actively and regularly in its production, and assumes the financial risks, it is fair to consider the employer the 'author' for copyright purposes").

and statutory history provide a basic structure,⁷⁹ the work for hire concept has been substantially developed in the courts.⁸⁰ The 1989 United States Supreme Court decision in *Community for Creative Non-Violence v. Reid*⁸¹ was an attempt to shape the work for hire provision into a more defined concept for determining copyright

79. The work made for hire provision of the 1976 Copyright Act is split between employees and independent contractors of commissioned works. 17 U.S.C. § 101 (1994). The statute provides:

A “work made for hire” is

- (1) A work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Id.

80. The work made for hire provision did not define the terms “employee” and “scope of employment.” The lower courts were therefore left to grapple with interpretation of those terms, producing inconsistencies among the circuits. One interpretation of employer relationship under the work made for hire provision was the right to control test. *See, e.g., Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (D.Colo. 1985) (focusing on the control the hiring party maintained over the work). A second test was developed in *Dumas v. Gommerman*, 865 F.2d 1093 (9th Cir. 1989), where the Ninth Circuit held that only formal, salaried employees should be considered an employee under the 1976 Act. A third approach, looking to the actual control of the hiring party over the hired party, received the most acceptance. This approach was adopted by the Second, Fourth, and Seventh Circuits. *See, Brunswick Beacon v. Schoch-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); *Evans Newton, Inc. v. Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986); *Aldon Accessories Ltd. v. Spiegel*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). The fourth test was developed by the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987). This test employed agency principles to first interpret whether the hired party was an employee or independent contractor. *Id.* at 335. These four interpretations resulted in inconsistent copyright protection for works made for hire.

81. 490 U.S. 730 (1989).

ownership.⁸²

Reid involved a dispute between the hiring party, CCNV, and the artist-hired party, Reid, over copyright ownership and control over a sculpture produced for a 1985 holiday pageant in Washington D.C.⁸³ The sculpture, titled “Third World America,” was a compilation of ideas and materials from CCNV and Reid, although it was exclusively created and produced by Reid.⁸⁴ After “Third World America” was displayed for a month it was returned to the artist for repairs.⁸⁵ CCNV began to make plans to take the work on a several city tour to raise money for the homeless. Reid objected to the tour based on the inevitable damage a tour would cause the work. Based on his objection, Reid refused to return the work.

In March of 1986 both parties filed competing copyright registrations for “Third World America.” CCNV then commenced an action for return of the work and for determination of copyright ownership.⁸⁶ The district court determined that CCNV was the owner of the copyright, declaring that the display was a work made for hire under section 101 of the 1976 Act.⁸⁷ The United States Court of

82. The Supreme Court granted certiorari to resolve the conflicting tests the circuits were applying to determine work made for hire status. See *supra* note 80 for the conflicting tests. The Court recognized the implications of classifying a work as made for hire and, therefore, was specifically interested in settling the dispute over the term “employee” within the meaning of the statute. *Reid*, 490 U.S. at 736-37.

83. The hiring party, Community of Creative Non-Violence (CCNV), “hired” Baltimore artist, James Earle Reid, to sculpt figures for a modern Nativity display. *Reid*, 490 U.S. at 733. This display focused on a contemporary homeless family huddled around a street grate to keep warm. Reid donated his services so all CCNV funds were dedicated for materials and payment of assistants. *Id.* Copyright ownership was never discussed before the dispute arose.

84. Reid worked on the statue through November and part of December 1985. *Id.* at 734. CCNV members visited Reid at his studio several times to check his progress and to coordinate CCNV’s construction of the pedestal for the figures. Reid incorporated most of CCNV’s suggestions and complied with its directions on the display’s appearance. *Id.*

85. *Reid*, 490 U.S. at 735.

86. *Id.*

87. The court reasoned that Reid was an “employee” because CCNV had conceived of the idea for “Third World America,” was the motivating force in its production, and had directed Reid’s efforts in its construction. *Id.* at 735-36.

Appeals for the District of Columbia Circuit reversed this finding, holding that the sculpture was not a work made for hire because Reid was an independent contractor, not an employee under agency law.⁸⁸ The United States Supreme Court agreed with the court of appeal's work made for hire approach and subsequently affirmed.

Justice Marshall, writing for a unanimous court, reviewed the four interpretations of the term "employee."⁸⁹ Upon rejecting three of the tests, the Court adopted the approach of the Fifth and D.C. Circuits: the agency law approach.⁹⁰ The Court felt that the agency principles would "enhance predictability" of copyright ownership.⁹¹ The Court listed the factors used to determine employee status. These factors, not one of which was to be determinative alone, have become known as the "Reid Factors:" the hiring party's right to control the manner and means by which the work is produced; the skill required to accomplish the work; the source, or owner, of the tools and instrumentalities used to produce the work; the location of the work; the duration of the relationship between the parties; the right of the hiring party to assign additional projects to the hired party; the extent of the discretion the hired party has over when and how long she works; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and, the tax treatment of the hired party.⁹²

88. *Reid*, 490 U.S. at 736. The court adopted the "literal interpretation" of the Fifth Circuit in *Easter Seals*. This approach applied agency principles to determine a hired party's status. See *supra* note 80.

89. The four tests were the right to control the product test, the actual control test, the formal, salaried employee test, and the agency law approach. See *supra* note 80. CCNV advocated the right to control test and the actual control test as the proper approaches for determining Reid's status as an employee. The Court, however, rejected these tests as inconsistent with the language and structure of section 101. *Reid*, 490 U.S. at 741-43. The Court also rejected the position of Reid and various amici for a formal, salaried employee test. *Id.* at 742 n.8.

90. The Court found support for this approach in the language of the statute and its legislative history. *Reid*, 490 U.S. at 744-48.

91. *Id.* at 749.

92. *Id.* at 751-752. The Supreme Court applied the agency factors to the relationship between CCNV and Reid and came to the same conclusion as the Court of Appeals: Reid was an independent contractor, not an employee under

Although the Supreme Court intended its Reid Factors to resolve the various interpretations of an “employee” in the work made for hire determination, it is evident that circuit courts have once again modified, or re-prioritized, the elements in considering a work for hire to determine copyright ownership. For example, the Second Circuit defined a “weighted” Reid Factor approach in its 1992 decision in *Aymes v. Bonelli*.⁹³ The court listed five Reid Factors it deemed most “significant” in almost every work for hire case.⁹⁴ It

agency principles. *Reid*, 490 U.S. at 752-53. The Court found that although CCNV directed some of Reid’s work, the other factors weighed heavily for finding an independent contractor. Even though the Court determined that Reid was an independent contractor, it was not clear whether Reid and CCNV could be considered joint authors. It remanded for further determination. *See* *Community for Creative Non-Violence v. Reid*, CIV.A.No. 86-1507(TPJ), 1991 WL 415523 (D.D.C. Jan. 7, 1991), for the district court’s consent judgment on the ownership resolution.

93. 980 F.2d (2d Cir. 1992). The facts of the case were as follows: Clifford Scott Aymes was hired as a computer programmer by Jonathan Bonelli, doing business as Island Recreational (a chain of swimming pool stores). *Id.* at 858. During the period he worked for Bonelli, Aymes created a series of computer programs that were used to maintain a variety of records. There was no agreement concerning copyright ownership, although Aymes asserted that Bonelli had orally promised him that the program would only be used at one computer, in one Island office. *Id.* Aymes left Island after two years when his hours were cut. *Id.* at 859. He subsequently registered the program in his own name at the Copyright Office and sued Bonelli and Island for copyright infringement for its later use of the program at multiple sites. *Id.*

The district court found that Aymes was an employee of Bonelli and that the programs were therefore works made for hire, granting copyright ownership to Bonelli and Island. *Id.* The Second Circuit reversed the district court, finding the misapplication of the Reid Factors as mandating a more structured approach.

94. *Id.* at 861. The court justified its approach by noting that because Reid’s discretionary factors gave “no direction” for deciding how to balance the factors, a weighted approach would give more structure to the Reid Factors. *Id.* It listed the five significant factors in almost any cases as:

- (1) the hiring party’s right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.

Id. The court stated that these factors were more important than the other Reid Factors because the five “will usually be highly probative of the true nature of the

stated that although these five factors should “be given more weight” in determining an employment relationship, an analysis may also include a review of other Reid Factors only if such factors demonstrate importance to the facts of the case.⁹⁵ The court discarded the remaining Reid Factors that had little significance to the facts, as indeterminate or irrelevant, noting other circuits’ adoption of some variety of the weighted approach.⁹⁶

Another example of the lack of stability inherent in the Reid Factors is found in some circuit courts’ treatment of their lower courts’ findings of fact.⁹⁷ An application of the Reid Factors to any particular situation necessarily involves many specific fact determinations by the district court. Although appellate courts normally give deference to a district court’s finding of facts, several appellate courts have tended to do their own fresh fact finding in the work made for hire context.⁹⁸ The appellate courts’ “de novo” review

employment relationship.” *Id.*

The Second Circuit applied the five factors to the facts and concluded that Aymes was an independent contractor under its approach. It found that Aymes’ high level of skill as a computer programmer, the absence of employee benefits, and his tax treatment by Island were indicative of an independent contractor. *Id.* at 862-63. Although the court found that Bonelli retained the right to control the work and assign Aymes other projects, it concluded that these factors were outweighed by the other three.

95. *Id.* at 864 (noting that “[t]he other factors were either indeterminate, because they were evenly balanced between the parties, or of marginal significance, because they were inapplicable to these facts”). The court nevertheless reviewed the remaining Reid Factors to demonstrate why they were relatively insignificant.

96. *Id.* at 861 (noting that “[a]lthough the Reid test has not yet received widespread application, other courts that have interpreted the test have in effect adopted this weighted approach by only addressing those factors found to be significant in the individual case”). The court then cited cases from the Third and Eleventh Circuits and various district courts which supported a pick-and-choose-the-factors approach advocated by the Second Circuit.

97. David Goldberg and Robert J. Bernstein, *Revisiting the Facts in Work-For-Hire Cases*, N.Y. L.J., January 19, 1996 (finding “appellate review of a district court’s factual findings on the issue [of work made for hire under *Reid*] seems increasingly less deferential than in other contexts”).

98. *Id.* The Second Circuit has developed somewhat of a reputation for revisiting the facts in a Reid Factor analysis. In *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992), the Second Circuit reversed the district court’s finding of an

of the facts under the work for hire factors is evidence that the Reid Factors can be molded and shaped to reach a desired conclusion, despite the existence of facts which also support a contrary outcome.

The Reid Factors do not render a consistent or predictable result due to the highly factual nature of the determination and the conflict between the circuit and district courts to pinpoint the relevant factors. This unpredictability has become more problematic since work for hire status is now relevant beyond the copyright ownership question. The passing of VARA, one year after the *Reid* decision, introduced moral rights which can be profoundly impacted by the Reid Factors.

Because moral rights can often hinge on a court's determination of the artist's status as an employee or independent contractor, a predictable and balanced work for hire test is crucial. Beyond the discretionary nature of the Reid Factors is an underlying problem of current U.S. copyright law. The "clash" of the work for hire doctrine and moral rights theory can result in competing interests between the employer's economic right in the visual art work and the employee-creator's moral rights. Under current U.S. copyright law, this clash extinguishes the artist's moral rights. The next section illustrates this clash and its impact on irreplaceable works of art.

employment relationship through its five factor analysis. See *supra* notes 93-96 and accompanying text. In *Playboy Enterprises, Inc. v. Dumas*, 53 F.3d 549 (2d Cir. 1995), the Second Circuit reversed the district court's finding of an independent contractor status and remanded for further consideration, rejecting its fact finding and application of the Reid Factors. Finally, *Carter v. Helmsley-Spear*, 71 F.3d 77 (2d Cir. 1995), stands as the most blatant example of the Second Circuit's willingness to make its own fact determination contrary to that of the district court. See *infra* notes 99-149 and accompanying text for discussion of the *Carter* decision.

The Sixth Circuit has also lowered the clearly erroneous threshold to review the facts for itself when there is a work for hire issue. For example, in *Hi-Tech Video Productions Inc. v. Capital Cities/ABC Inc.*, 58 F.3d 1093 (6th Cir. 1995), the Sixth Circuit reversed a lower court finding of an employee relationship, citing errors in the factual findings of several Reid Factors. See *infra* notes 170-176 and accompanying text for further discussion of *Hi-Tech Video*.

III. CLASH ILLUSTRATED: *CARTER V. HELMSLEY-SPEAR, INC.*⁹⁹

An artist who needs to preserve the physical integrity of her work from some impending modification¹⁰⁰ or destruction¹⁰¹ by another may assert her moral rights to protect her work. However, merely “asserting” one’s moral rights will not automatically protect the art work. An artist must clear a number of “hurdles” before the courts will permanently enjoin another from modifying or destroying the artist’s work.¹⁰² One of the most difficult hurdles an artist must clear can be proving that she is an independent contractor, and not an employee under the work made for hire determination. A court’s interpretation of the discretionary Reid Factors as applied to a moral rights determination may forfeit the necessary moral rights to save the artwork. *Carter v. Helmsley-Spear, Inc.* represents how this discretionary test will produce inconsistent results for recognizing

99. 71 F.3d 77 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1824 (1996).

100. Modification of an art work includes distortion and modification, as covered under VARA. See *supra* notes 49-51 for discussion on rights against distortion, mutilation and other modification.

101. See *supra* notes 52-53 and accompanying text.

102. This author describes the requisite VARA elements necessary to make out a federal moral rights claim as “hurdles.” This term is used to illustrate the difficulty an artist faces when she attempts to claim her moral rights in her work. A brief description of the “hurdles” is useful.

A threshold question, or first hurdle, is inquiring whether the artist previously waived her moral rights. The waiver, however, must be a clear, written release of the artist’s moral rights to the specific work at issue. See *supra* note 61.

Another hurdle is whether the work at issue falls within the definition of visual art. See *supra* notes 63-65 and accompanying text. Of course, even if the work is a limited edition painting, for example, its status as a visual art work further depends on whether it falls into one of the exceptions to visual art. See *supra* note 65 (listing such exceptions to the visual art classification as useful articles, applied art, motion pictures, charts, books, advertising items or any works made for hire).

In the case of a modification (including mutilations and distortions) the artist must further prove that such modification would prejudice her honor or reputation. See *supra* notes 50-51 and accompanying text. On the other hand, in the case of destruction, the artist must prove that her work is of recognized stature to receive protection. See *supra* notes 52-57 and accompanying text. Finally, the death of the artist will extinguish any moral rights claim by her heirs or assigns. See *supra* note 39 and accompanying text.

moral rights.

A. Background

Plaintiffs John Meade Swing, John James Veronis, Jr. and John Francis Carter, three partners known as the “ThreeJs” or “Jx3” (hereinafter “artists” or “ThreeJs”), are professional sculptors who work together to create sculptures and other artwork.¹⁰³ On December 16, 1991, the three artists entered into a one year contract with the net lessee (the defendant’s predecessor) of a large commercial building at 47-44 31st Street in Queens, New York, to design and install sculptures and permanent installations in the lobby area (hereinafter referred to as the “Work”). The contract gave the artists “full authority in design, color and style,” and the managing agent of the building retained some authority to direct the location and installation of the Work on the property’s premises.¹⁰⁴ The artists also retained the copyrights in the Work with any proceeds from the exploitation of the copyright split equally between the artists and the managing agent. The artists were each paid \$1000 weekly pursuant to the contract, with no set date for completion of the Work. In fact, on January 20, 1993, the parties executed an agreement extending the duration of their relationship for an additional year.

The Work was described by the court as “a very large ‘walk-through sculpture’ occupying most, but not all, of the building’s lobby.”¹⁰⁵ The theme of the Work focused on environmental concerns by utilizing recycled material in an interrelated manner. The variety of sculptural elements in the football-field sized work consisted primarily of metal affixed to the walls and ceilings. Among other things, the Work included a giant hand made from an old school bus, a face made from car parts and other interactive components. The Work also included a vast mosaic made from recycled glass which was embedded into the floors and walls.¹⁰⁶

103. *Carter*, 71 F.3d at 80.

104. *Id.*

105. *Id.*

106. *Id.* The interrelated nature of the sculptural components played off one another. The District Court opinion described one portion of the Work which

The Work was about seventy-five percent complete, when in April 1994, the lessees of the building became insolvent and filed for bankruptcy. It was at this time that defendant Helmsley-Spear became the managing agent for the building and subsequently ordered the artists to leave the premises and not return. Helmsley-Spear also made statements indicating that the Work would be removed or materially altered.¹⁰⁷ The artists filed suit under VARA to prevent the mutilation and inevitable destruction of the lobby sculpture.

*B. District Court Determination*¹⁰⁸

The district court began its work made for hire analysis with a quick review of the statutory provisions and the Reid Factors. The court noted the five relevant Reid Factors as identified by the Second Circuit in *Aymes v. Bonelli*.¹⁰⁹ Although this 1992 case established five Reid Factors relevant to almost any case, the court recognized that all of the Reid Factors must be given weight according to the facts in a given case. The five factors recognized were: “the right to control the manner and means of production; requisite skill; provision of employee benefits; tax treatment of the hired party; whether the

contained a floor and ceiling mosaic depicting a dollar bill: “The images on the front and back of a dollar bill, the text of the mosaic, and related sculptural elements, together depict the destruction of the world’s oceans as a result of man’s greed.” *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228, 235 (S.D.N.Y. 1994).

107. Removal of the Work from the lobby would have resulted in its destruction. *Carter*, 71 F.3d at 83.

108. The district court initially granted the artists a temporary restraining order to prevent Helmsley-Spear from altering or modifying the installation until the outcome of the case. *Carter v. Helmsley-Spear, Inc.*, 852 F. Supp. 228 (S.D.N.Y. 1994). Because the artists had not previously waived their moral rights (or their copyrights, for that matter), and the District Court was easily persuaded both that prejudice to the artists’ honor or reputation would result from modification and that the Work was of “recognized stature,” the bulk of the court’s opinion was devoted to determining whether the Work was a work made for hire. *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 316-27 (S.D.N.Y. 1994).

109. 980 F.2d 857 (2d Cir. 1992); see *supra* notes 93-96 and accompanying text (discussing the Second Circuit’s decision in *Aymes* as one example of how the Reid Factors have taken a shape of their own in the various circuits).

hired party may be assigned additional projects.”¹¹⁰ The court focused its Reid Factor analysis on these five issues.

The district court first found that the artists had complete control over the manner and means in producing the Work.¹¹¹ The district court further noted that the artists also had complete artistic freedom in designing and installing the Work.¹¹² The court thus found the artists’ freedom to create a strong factor in support of independent contractor status.

The second factor concerned the level of skill required to create the Work.¹¹³ The court noted that the “ThreeJs,” as artists and sculptors, were highly skilled professionals. The court found that the entire creation process “clearly required great skill” and, accordingly, weighted this factor in favor of an independent contractor status.¹¹⁴

The court merged the next two factors together in its analysis. The provision of benefits to, and the tax treatment of, the artists tended, in the district court’s view, to favor the defendant’s contention that the artists were employees.¹¹⁵ The district court found it undisputed that the managing agent had provided the artists with health and insurance benefits and that taxes had been withheld from the artists’ payments.¹¹⁶ The court noted that although the managing agent had provided benefits, these provisions were cut in December, 1993, and the artists had continued to work without them.¹¹⁷

The fifth factor, and final one under the Second Circuit *Aymes*

110. *Carter*, 861 F. Supp. at 317.

111. *Id.* at 317-318 (finding that “the record demonstrates that plaintiffs had virtually unfettered discretion in creating the Work”). The court pointed out that under the terms of the contract, the artists retained “full authority in design, color and style.” *Id.* at 317.

112. *Carter*, 861 F. Supp. at 317 (noting that the artists “understood that they were commissioned to design a lobby that would be a ‘museum’ of their original art”).

113. *Id.*

114. *Id.* at 318.

115. *Id.* at 318-319.

116. *Id.* at 318.

117. *Id.* Based on the cutting of benefits, the court seemed to weigh only the tax treatment as favoring the defendants: “This factor [benefits] is not determinative [of employee status] especially in light of the fact that plaintiffs continued to work on the Work once the provision of benefits had ceased.” *Id.*

approach, was the right to assign additional projects.¹¹⁸ Based on the contract and supporting testimony, the district court found that the artists were hired to perform a specific task, to install art on the property. The contract provided for the artists to design and install the sculpture on the property and to perform other “related services and duties” as assigned from time to time.¹¹⁹ The district court found that this provision supported the contention that the artists “were hired solely to install art on the property” and that a few additional tasks that the artists did perform on the property did not undermine this position.¹²⁰

The court noted that although the facts supported a finding for independent contractor status under the *Aymes* approach, it would also consider the remaining Reid Factors to further examine the issue.¹²¹ In the court’s view, these other factors also supported its initial finding for independent contractor status.¹²²

118. *Carter*, 861 F. Supp. at 319 (highlighting that “independent contractors are typically hired only for particular projects.”) (citing *Aymes*, 980 F.2d at 863).

119. *Carter*, 861 F. Supp. at 319.

120. The district court noted that although the artists did install artwork in other areas of the property, that on one occasion the artists refused to undertake an assignment in another building. *Id.* at 319. The fact that the artists were not penalized or fired for their refusal supported the district court’s finding that the defendants never viewed the artists as employees who could be assigned additional work. *Id.*

121. *Id.* at 319-21. The court listed the remaining Reid Factors:

(1) the source of the instrumentalities and tools; (2) the location of the work; (3) the duration of the relationship between the parties; (4) the extent of the hired party’s discretion over when and how long to work; (5) the method of payment; (6) the hired party’s role in hiring and paying assistants; (7) whether the work is part of the regular business of the hiring party; and (8) whether the hiring party is in business.

Id. at 319.

122. The court found four of the eight remaining Reid Factors relevant to determining whether the Work was a work for hire. The court found the duration of the relationship between the artists and the defendant supported the artists’ contention that they were independent contractors. *Id.* at 320. Another factor found by the court to favor the artist’s position was the extent of the discretion the artist had over their hours to work. *Id.* The court also determined that the Work was not the type of work created in the regular course of the defendant’s business. *Id.* at

Beyond its finding of independent contractor status under the *Aymes* approach and remaining Reid Factors, the district court considered an additional factor which bolstered its conclusion. The district court additionally relied on the artists' copyright ownership in the work, as provided for in the contract, as a "plus factor" in finding the artists were independent contractors.¹²³ The district court found this factor helpful in ascertaining how the parties viewed their own relationship before the litigation ensued.¹²⁴ It noted that employers usually contemplate the creation of copyrightable material for its benefit.¹²⁵ The fact that the defendant did not reserve this right may have indicated its assessment of the relationship as a hiring party of a commissioned work.

Based on these findings, the court concluded that the Work was not a work made for hire and, thus, covered by VARA. The court therefore granted the artists a permanent injunction prohibiting Helmsley-Spear from modifying or removing the Work for the lifetimes of the artists.¹²⁶

C. Second Circuit Review

The Second Circuit reviewed the facts in light of the relevant Reid Factors (as supplied under *Aymes*) and subsequently arrived at a contrary conclusion from that of the district court. In the Second Circuit's judgment, the factors weighed more heavily for a finding of an employer/employee relationship and, therefore, the Work was a work made for hire.

321. It accordingly found these factors to weigh in favor of the artists. Although the court found that the method of payment, weekly checks to each artist, tended to support the defendant's contention that the artists were employees, it concluded that the *Aymes* approach and the remaining Reid Factors ultimately favored a finding of independent contractor status.

123. *Carter*, 861 F. Supp. at 321-22.

124. *Id.* at 322.

125. *Id.* at 321.

126. *Id.* at 322. The court did, however, dismiss the artists' claims for tortious interference, award of costs and attorney's fees, and also refused their request to complete the lobby artwork. The court also dismissed Helmsley-Spear's counterclaim for waste. Both sides appealed.

The Second Circuit began its review of the case with the history and development of moral rights under VARA.¹²⁷ The court reviewed VARA's provisions for the right to attribution and integrity. The court pointed out that the right to integrity gives the author the right to prevent deforming or mutilating changes to her work even after she has parted with the economic rights. The court further recognized that the right of integrity includes the right to prevent destruction of the artwork.¹²⁸ The court noted that the perception of the purpose of moral rights reflects whether or not the integrity right protects a work of art from destruction.¹²⁹

The court reviewed the section 101 definition of a work made for hire and listed the Reid Factors used in the employee/independent contractor analysis. The court noted its normal reluctance to overturn a district court's factual findings in determining the presence or absence of the Reid Factors.¹³⁰ It also highlighted the "ease" with which the Reid test could be misapplied.¹³¹

127. *Carter*, 71 F.3d at 81-3.

128. *Id.* at 81-2. The court stated that "[i]n some jurisdictions" the right of integrity protects art work from destruction. The reference to jurisdictions includes the United States, as well as most member countries adhering to Berne Convention. As previously explored in note 60 and text, Article 6bis of Berne Convention does not explicitly prohibit destruction under moral rights. However, destruction could be covered under Article 6bis "derogatory action." The court's reference to "some jurisdictions" seems odd since the right against destruction is clearly proscribed in VARA. See *supra* note 52. The language in the opinion tends to lead a reader to conclude that the U.S. is distinct from, rather than included in, the jurisdictions prohibiting destruction of irreplaceable works of art.

129. *Carter*, 71 F.3d at 81-2. Judge Cardamone, author of the Second Circuit opinion, framed the purposes as follows:

If integrity is meant to stress the public interest in preserving a nation's culture, destruction is prohibited; if the right is meant to emphasized the author's personality, destruction is seen as less harmful than the continued display of deformed or mutilated work that misrepresents the artist and destruction may proceed.

Id. (citations omitted).

130. *Id.* at 85. An appellate court's review of a district court's findings of fact is the clearly erroneous standard. A legal conclusion is reviewed *de novo*.

131. *Id.* This language tends to show the Second Circuit's view of its role in a Reid Factor review. Its almost as though the court assumed a duty to undertake its own factual finding of each factor to prevent this "misapplication." See *supra* notes

The court found overwhelming evidence to support the artists' contention that they controlled almost all aspects of the sculpture's creation.¹³² The court agreed with the district court that the artists retained "complete artistic freedom" even though the artists accepted suggestions from building agents on various aspects of the sculpture.¹³³ Although the court found the right to control factor "lent credence" to the artists' contentions that they were independent contractors, it noted that one factor is not dispositive in the inquiry.

The Second Circuit also agreed with the district court that the artists' performance of the work required great skill in creation and execution.¹³⁴ It was undisputed that each artist was recognized as a "professional" and that sculpting is a highly skilled profession. This factor also weighed against a finding of a work for hire.

The employee benefits and tax treatment, the third and fourth factors, were found to weigh in favor of finding an employee status, just as the district court had found.¹³⁵ The district court, however, did not give these factors as much weight because the defendants had ceased providing benefits at the end of 1993 and the artists subsequently continued to work without benefits.¹³⁶ The court of appeals did not recognize the discontinuance of benefits as affecting the outcome of these two factors. It found these two factors also favored a finding of employee status.¹³⁷

The right to assign additional projects was the last factor under the *Aymes* approach. The court found, contrary to the district court's finding, that the defendant had the right and did assign additional projects to the artists. The court disagreed with the district court that just because the few other tasks the artists did perform were art

97-98 and accompanying text for examples of the circuit courts' review of district courts' factual findings.

132. *Id.*

133. *Id.*

134. *Id.* See *Carter*, 861 F. Supp. at 318 for discussion of the district court's analysis of the second factor.

135. *Carter*, 71 F.3d at 86. See *Carter*, 861 F. Supp. at 318-19 for the district court's discussion of these issues.

136. *Carter*, 861 F. Supp. at 319.

137. *Carter*, 71 F.3d at 86.

related that it was not an “additional project.”¹³⁸ The Second Circuit emphasized that the artists were primarily hired to create the lobby sculpture and any additional projects assigned supported a conclusion of an employee role.¹³⁹

The Second Circuit viewed the fact that the artists had completed three additional projects on the property without objection as conclusive of employee status. The court therefore found the district court’s determination of this factor clearly erroneous. It determined that the defendant’s ability to assign additional projects weighed in favor of finding a work for hire.¹⁴⁰

After reviewing the five factors under the *Aymes* approach, the court briefly listed a few other Reid Factors which were indicia of an employment relationship. While the district court had found four of the remaining eight Reid Factors helpful in its assessment of the artists’ status, the Second Circuit only discussed three factors, two of which were previously determined by the district court to be “inconclusive.”¹⁴¹ The court found that the defendant provided many supplies used to create the work.¹⁴² The court also determined that since the artists had to seek payment from the defendant for its paid assistants, that this factor also favored finding an employment relationship.¹⁴³ The Second Circuit further disagreed with the district

138. See *Carter*, 861 F. Supp. at 319 for district court’s application of the final factor.

139. *Carter*, 71 F.3d at 86. The court found that “performance of other assigned work not of the artists’ choosing supports a conclusion that the artists were not independent contractors . . .” *Id.*

140. *Id.*

141. See *Carter*, 861 F. Supp. at 319-22 for the district court’s review of the inconclusive factors.

142. The source of tools and instrumentalities factor was considered inconclusive by the district court because it found that both the artists and defendants had provided the materials for the Work. *Carter*, 861 F. Supp. at 320. The Second Circuit did not provide any facts to support its assertion that the defendant provided many supplies, implying that the artists contributed nothing.

143. The district court had found the right to hire assistants factor inconclusive in this case. *Carter*, 861 F. Supp. at 320-21. The district court noted that the artists were responsible for hiring all assistants, paid and unpaid, and the defendant was responsible for compensating the paid assistants. *Id.* This splitting of the factor rendered it neutral in the district court’s view. The Second Circuit obviously

court that the artists and defendant had a “finite term of engagement.”¹⁴⁴ The Second Circuit found that the artists worked on the Work for a “substantial period of time,” with no set date for completion of the project.¹⁴⁵ It thus concluded that these three factors also supported an employee relationship.¹⁴⁶

The court of appeals made only a brief reference to the artists’ copyright ownership in the Work.¹⁴⁷ The court admitted its uncertainty of whether copyright ownership was indeed a “plus factor,” as the district court found it to be, but declined to decide its value. It decided to “put off for another day . . . whether copyright ownership is probative of independent contractor status.”¹⁴⁸

The court concluded that the assessment of the five relevant factors, as well as a review of other applicable Reid Factors, provided more than sufficient evidence that the artists were employees and that the Work was therefore a work for hire.¹⁴⁹ In sum, this determination removed the work from VARA’s protective ambit, thereby forfeiting the artists’ right to prevent the destruction of their work.

IV. ANALYSIS

Carter is significant as the first VARA decision on the issue of moral rights in a work for hire setting. The outcome of this decision represents some of the weaknesses of VARA and some of the shortcomings of the Reid Factors. This section analyzes the decision

disagreed with the district court’s determination on this factor.

144. *Carter*, 71 F.3d at 87. The district court termed the relationship as “finite” because the relationship was to end with the completion of the Work. It found this arrangement to characteristic of an independent contractor relationship. *Carter*, 861 F. Supp. at 320.

145. *Carter*, 71 F.3d at 87.

146. *Id.* The Second Circuit did not address the three other Reid Factors that the district court found relevant to the inquiry: the discretion the artists had over their hours, the method of payment and whether the defendant created sculptures as a regular course of business.

147. *Carter*, 71 F.3d at 87.

148. *Id.* The court also stated that even as a plus factor, copyright ownership in this case would not alter the outcome of its determination. *Id.*

149. *Id.* at 87-88.

rendered in *Carter*, the current problematic application of the Reid Factors and the flaws in VARA itself.

A. Carter v. Helmsley-Spear: Flawed Application Exposed

The Second Circuit decision in *Carter* exploited VARA's weaknesses and molded the Reid Factors to render a judgment which both stripped the artists of their moral rights and will deprive society from viewing their irreplaceable art. An analysis of the district court and Second Circuit opinions exposes this inequitable result.

Under the *Aymes* approach, the disputed factor in *Carter* appeared to be the hiring party's right to assign additional projects.¹⁵⁰ This factor can be relevant since "independent contractors are typically hired for only particular projects."¹⁵¹ Thus, as the district court explained, "when a hired party is hired to participate in numerous unspecified chores" as directed by the hiring party, then the hired party is usually an employee; on the other hand, "when a hired party is hired to complete or achieve a specific task," it is probable that that party is an independent contractor.¹⁵²

The district court found that the artists were hired to perform a specific task: to install art on the property.¹⁵³ The district court further noted that the artists were not reprimanded for refusing to perform an assignment at a different property.¹⁵⁴ The Second Circuit, on the other hand, failed to mention the artists' refusal and instead

150. Both the district court and the Second Circuit had agreed that the artists' had complete control over the production of the Work and that the artists were highly skilled. Both courts also agreed that the employee benefits and tax treatment of the artists were characteristic of an employment relationship. The courts diverged on how much weight to accord these last two factors.

151. *Aymes v. Bonelli*, 980 F.2d 857, 863 (2d Cir. 1992).

152. *Carter*, 861 F. Supp. at 319.

153. *Id.* The district court based its decision on the contract and supporting testimony. The contract provided that the artists were to install the Lobby Work and other permanent installations on the property.

154. *Id.* The district court also noted that one of the artists was a licensed structural steel welder and that he was never asked to use his welding skills other than to complete the Work. This further supported the district court's position that the artists' were hired to install art work on the property and not to perform unrelated tasks.

focused on the fact that the artists had performed three other art related tasks in the building. It apparently concluded that installation of art in the building was not a single project but rather constituted unspecified tasks.

The disparity in outcomes on this factor appears to revolve around the interpretation of “project.”¹⁵⁵ The district court did not view the installation of art in various places on the property as separate tasks, but rather as a part of a single project. On the other hand, the Second Circuit used the completion of other art works as proof of employee status. It is unclear which interpretation of “project” is correct based on facts which support either interpretation. This factor may have been better decided as “indeterminate” of whether the work was made for hire.

Regardless of whether this factor favored the artists or not, given the nature of the Work (several, interrelated sculptures united with a consistent theme) and the conflicting views on what constituted a “project,” this factor should not have been afforded the “weight” it received. Just because this factor was identified in *Aymes* as a “significant” factor should not mean that the Second Circuit could not have accorded this factor less weight. Even when the Second Circuit applied this factor in *Aymes*, it found that the hiring party’s right to assign other projects “carrie[d] less weight” than the other four factors.¹⁵⁶ It gave this factor less weight in *Aymes* because even though the hiring party assigned *Aymes* other projects in addition to the creation of the computer program, this delegation of other tasks was “not inconsistent with the idea that he [Aymes] was Island’s independent trouble shooter who might be asked to intervene as computer problems arose.”¹⁵⁷ The Second Circuit should have applied similar logic to *Carter*. The artists’ completion of other art work on the property was not inconsistent with the theory that they were art consultants who might be asked to continue their lobby Work into other areas of the building to entice future tenants. Even if the Second Circuit found this factor to favor the defendant, it should have given it less weight than the other factors, just as it had

155. The Second Circuit failed to defined “project” for future cases.

156. *Aymes*, 980 F.2d at 863.

157. *Id.*

done in *Aymes*.

While the court should have given the control factor less weight in its analysis, it should have afforded greater weight to the exclusive artistic control the artists had over the manner and means of production. Since the Second Circuit was applying the Reid Factors in a new setting (moral rights), it should have applied the factors with an eye towards vindicating the purpose of VARA: protection of personal moral rights. The fact that the artists had complete artistic freedom strengthens their claim for moral rights since it was exclusively their “personality” projected into the Work. Therefore, a greater emphasis on the artistic freedom would, at the very least, give consideration to protecting their personality embodied in the art.¹⁵⁸

The employee benefit and tax treatment factors are also significant to understand the Second Circuit’s conclusion in *Carter*. Both courts found that because the artists received benefits and had taxes withheld from payments, that these two factors weighed in favor of employee status. The district court gave the benefit factor less weight since the artists continued their work without benefits when the defendant had ceased providing them in December, 1993. The Second Circuit gave this fact no consideration and found that these two factors clearly favored a finding of employee status.

The disturbing element of the Second Circuit’s disposition on these two factors is not the conclusion (for it really was not disputed that the artists received benefits and had money withheld for taxes), but rather it was the heavy emphasis the court placed on these two factors. It was as though the Second Circuit decided the artists’ status based exclusively on their benefits and tax treatment. This is supported by two observations. First, the Second Circuit appears predisposed to rely exclusively on these two factors based on language in its *Aymes* decision. The court in its *Aymes* opinion stated that “[t]he importance of these two factors is underscored by the fact

158. See *infra* note 178 and accompanying text for the suggested Reid approach in a moral rights determination. The Second Circuit noted that “despite the conclusion today we do not intend to marginalize facets such as artistic freedom and skill” although these factors “will usually favor VARA protection.” *Carter*, 71 F.3d at 87.

that every case since *Reid* that has applied the test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes.”¹⁵⁹ The Second Circuit obviously decided to follow its own “rule of thumb” and find an employment relationship based on a “formal” employment test. This rule of thumb appears to be a convenient substitute for the Reid Factors. However, the Supreme Court in *Reid* explicitly rejected a formal, salaried approach.¹⁶⁰ The Second Circuit, realizing such a rejection, therefore molded the remaining Reid Factors to reach its desired outcome.

The second observation to bolster the contention that the Second Circuit based its conclusion exclusively on the benefits and tax treatment is the lack of articulated support for the other factors. For example, the Second Circuit’s treatment of the remaining Reid Factors was haphazard and unsupported. The court only addressed three of the remaining eight Reid Factors, two of which were previously determined inconclusive by the district court.¹⁶¹ The court chose the facts it wanted to rely on, while completely failing to address why facts the district court relied on were irrelevant to its

159. *Aymes*, 980 F.2d at 863 (citations omitted). The court supported its assertion with citations from Third Circuit opinions and various district court holdings.

160. *Reid*, 490 U.S. at 743 n.8.

161. The Second Circuit found three “other” Reid Factors to favor the defendant: the defendant supplied many of the supplies; it provided payment for paid assistants; and there was no finite term for completion of the Work. *Carter*, 71 F.3d at 86-7. The Second Circuit did not address the district court finding that the artists used their own tools on the Work and had in fact invested thousands of dollars in supplies for the Work. The Second Circuit also failed to discuss that the artists had full responsibility and control over its assistants, even though they did not directly pay the paid assistants. The Second Circuit also rested its decision on its conclusion that the two year relationship was indicative of an employment relationship, even though (as the district court pointed out) that the relationship between the artists and the defendant was to terminate once the lobby Work was complete. *Id.* at 87. Given the enormous size of the Work and the fact that the lobby was a public area (thus limiting the hours in which the artists could install the components), two years does not seem to be an unreasonable time frame for the artists to install the Work.

decision.¹⁶² This failure to find additional substantive support for its conclusion furthers the theory that the Second Circuit decided the artists' fate on two of the twelve Reid Factors.

Perhaps the Second Circuit's most egregious error was its refusal to consider the artists' copyright ownership as relevant to determining the relationship. This refusal is indicative of a couple of issues. First, the Second Circuit's failure to articulate why it "put off for another day" to decide the relevance of copyright ownership further proves it had reached its conclusion with the benefit and tax factors. Second, the court completely missed the ironic relevance this factor had to the case. All previous work for hire case law had been developed to decide the very issue that was undisputed in *Carter*: copyright ownership of a particular work.¹⁶³ Thus, the clear delineation of copyright ownership in *Carter* was given no weight in the moral rights context, while the very case law the Second Circuit relied on was developed to settle disputes over copyright ownership.¹⁶⁴ Although copyright ownership should not be dispositive, it is certainly highly relevant to the status of the relationship and, therefore, deserved some consideration in *Carter*.

The impact of *Carter* is significant because it stands as the first decision on VARA and will serve as basis for future moral rights

162. The Second Circuit neither conceded nor struck down two Reid Factors the district court had found to support the artists: the discretion the artists had over their hours and that the Work was not the type of work created in the regular course of the defendant's business. This silence should be interpreted as supporting the artists' position.

163. For example, in *Reid* the issue was deciding who, employer or independent contractor, owned the copyright in "Third World America." *Reid*, 490 U.S. at 753. *Aymes* similarly involved a dispute over copyright ownership in a computer program. *Aymes*, 980 F.2d at 863.

164. See *Second Circuit Holds Sculpture to be Unprotected "Work For Hire"*, 109 Harv. L. Rev. 2110, 2113 (1996) (finding that the Second Circuit's failure to consider the artists' copyright ownership in the Work as evidence of its "fundamental misunderstanding of the difference between the function of the 'work for hire' provision in disputes over copyright ownership and its function in an assertion of moral rights under VARA"). It was further suggested that "the artists' retention of copyright effectively obviated the inquiry into the Restatement factors listed in *Reid*." *Id.* at 2114.

determinations.¹⁶⁵ The Second Circuit's heavy emphasis on the employee benefits and tax treatment spells trouble for artists who enjoy some security in the work that can be a sole means of support for themselves and their families. This emphasis on these two factors further perpetuates the idea that only a "starving artist" (who refuses to waive her rights) will enjoy any moral rights protection.¹⁶⁶

The decision also proves how malleable the Reid Factors have become. While the Second Circuit's *Aymes* approach is an attempt to give structure to the Reid Factors, its application only illustrates the highly discretionary and unpredictable nature of a finding under the work made for hire doctrine. The next section addresses these shortcomings and suggests a more consistent approach to moral rights theory.

B. Reid Factors: A "Tailored" Approach

The Reid Factors have been both praised and criticized since the Supreme Court's ruling in 1989.¹⁶⁷ On one hand, the Reid Factors did

165. The immediate impact of this decision is that the artists' irreplaceable work can be destroyed at the will of the defendant. Not only does this deprive the public from experiencing this "walk through sculpture," but it denies the artists the right to preserve a piece of their personality.

166. The Second Circuit appeared to realize some of the impact of its holding. It recognized that by using the existence of employment benefits against the artist that it appeared "that the artists regrettably are being forced to choose between personal benefits inuring in an employment relationship and VARA's protection of the artists' work afforded only to independent contractors." *Carter*, 71 F.3d at 87.

167. See, e.g., Alexandra Duran, Comment, *Community For Creative Non-Violence v. Reid: The Supreme Court Reduces Predictability by Attributing an Agency Standard to the Work For Hire Doctrine of the 1976 Copyright Act*, 56 BROOK. L. REV. 1081 (1990) (finding the agency law standard employed in Reid "impractical" because its complicated nature will reduce predictability at the beginning of a business relationship between the parties); Mary Tepper, Note, *Works Made For Hire and the Copyright Act of 1976--We're Finally Back Where We Started: Community For Creative Non-Violence v. Reid*, 109 S.Ct 2166 (1989), 59 U. CIN. L. REV. 299 (1990) (finding the Reid decision as "allowing predictability in future dealings"); Corey L. Wishner, Note, *Whose Work is it Anyway? Revisiting Community for Creative Non-Violence v. Reid in Defining the Employer Employee Relationship Under the "Work Made For Hire" Doctrine*, 12

resolve the conflicting tests employed by the circuit courts.¹⁶⁸ On the other hand, the Court's list of agency law principles have provided the district and circuit courts with a new conflict: application of the Reid Factors. The Supreme Court's goal to restore predictability to a work made for hire determination seems to have been defeated by its own test. By not providing any guidance or "formula," the Reid Factors have produced discrepancies among and within the circuits.

Some of the circuits that have confronted the Reid Factors have added new factors or shaped the list of Reid Factors into some type of structured or weighted approach. For example, in 1992, the Third Circuit in *Marco v. Accent Publishing Co.*¹⁶⁹ added three more agency principles to the Reid Factors, as well as, an "actual control" factor.¹⁷⁰ The Sixth Circuit has also considered factors not enumerated in *Reid*. In *Hi-Tech Video Productions Inc. v. Capital Cities/ ABC Inc.*,¹⁷¹ the Sixth Circuit gave great weight to the parties' own perception of their relationship.¹⁷² Another approach, formulated by the Second Circuit, was a weighted application consisting of five relevant Reid Factors.¹⁷³ This approach, articulated in *Aymes v. Bonelli* and followed in *Carter*, focuses on the significant factors and discards the irrelevant or indeterminate factors. These different approaches, while all employing some type of weighting system, continue to evolve with work for hire case law.

Not surprisingly, these various approaches have produced inconsistent results among the circuits. An illustration shows that

HOFSTRA L. REV. 393 (1995) (criticizing the factors as enumerated by the Supreme Court in *Reid* as too vague but hailing circuit court decisions employing a weighted or structured approach to the Factors).

168. See *supra* note 80 for the conflicting approaches among the circuits.

169. 969 F.2d 1547 (3d Cir. 1992).

170. *Id.* at 1550 (noting that the Supreme Court in *Reid* did consider the actual control of the work, even though this factor was not listed as an agency principle). The three additional Restatement factors the court relied on were the hired party's occupation, local custom and the parties' understanding of their relationship. *Id.* The four additional factors under the Third Circuit approach brings the total number of Reid Factors to sixteen.

171. 58 F.3d 1093 (6th Cir. 1995).

172. *Id.* at 1097-98 (giving significant weight to the witness' choice of terms to describe the relationship).

173. *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992).

different approaches among the circuits, even seemingly modest differences, can produce opposite results. For example, the Second Circuit's *Carter* decision could have been resolved for the artists under the Sixth Circuit approach in *High-Tech*.¹⁷⁴ Although the Sixth Circuit in *Hi-Tech* noted with approval the Second Circuit's weighted *Aymes* approach of the Reid Factors,¹⁷⁵ it substantially relied on a factor explicitly rejected by the Second Circuit: the perceptions of the parties.¹⁷⁶ In *Hi-Tech*, the court found the hiring party's testimony, using of words like "freelancers" and "independent contractors" to describe the hired parties, was "highly indicative of his assistants' independent contractor status."¹⁷⁷ The Second Circuit in *Carter*, on the other hand, refused to consider the perceptions the parties had of their own relationship. The Second Circuit dismissed the district court's finding of the artists' copyright ownership as

174. 58 F.3d 1093, 1094-95 (6th Cir. 1995). This case involved an allegation of copyright infringement. High-Tech, a video production company, had produced a "video postcard" of Mackinac Island in May, 1990 and registered it as a work made for hire with the Copyright Office. *Id.* at 1094. In early 1990, the producers at "Good Morning America" used a clip from the video without permission or acknowledgment in a feature story about Mackinac Island. *Id.* Hi-Tech sued ABC for copyright infringement. ABC challenged the copyright claim as invalid since the work was created by independent contractors and, therefore, not a work made for hire. *Id.* The Sixth Circuit reversed the district court's finding of a work made for hire and, therefore, held the copyright invalid. See *supra* note 97-98 and accompanying text discussing the circuit court's willingness to conduct a fresh review of the facts.

175. *Id.* at 1096-97 (stating its agreement "with the Second Circuit's approach" to weigh the factors according to their significance in the case). The court found the following factors significant to the case: the right to control, actual control, skill required, method of payment, employee benefits, tax treatment, the scope of the business and the perceptions of the parties. *Id.* at 1097-98.

176. *Id.* at 1097-98 (noting that the Restatement of Agency provides additional guidance to understanding a worker's employment status). The court found that the perceptions of the parties were relevant to deciding the status of a hired party. The Second Circuit in *Carter*, on the other hand, rejected any reliance on "magic words" of the contract language to prove status. The court stated that it was not persuaded by a "simplistic contention that usage of the words 'employ' or 'employment' in the agreements . . . establishes that the plaintiffs were employees." *Carter*, 71 F.3d at 87. It also refused to consider the artists' copyright ownership as evidence of the parties' perceptions.

177. *Id.* at 1098.

probative evidence of the parties' view of their own relationship. Presumably, the Sixth Circuit would have afforded the artists' copyright ownership in *Carter* some weight since the ownership is indicative of independent contractor status. In light of the close split in factors for the parties in *Carter*, a consideration of the artists' copyright ownership could have provided further evidence that the artists were independent contractors. This illustration demonstrates how the Reid Factors can render different results in the circuits.

Admittedly, a weighted approach to the Reid Factors, as opposed to listed factors, provides a more structured guidance to determine the status of the parties. However, even though an approach should be tailored to the facts of each case, the courts should articulate why *each* factor is relevant or indeterminate to the facts.¹⁷⁸ The courts should also be mindful that even in a weighted approach that no one or even two factors can exclusively support a finding. In addition, circuit courts need to give greater deference to district courts' findings of fact in work made for hire determinations, just as circuit courts give in other cases which require a factual review. Thus, a *tailored approach* to the Reid Factors, one which fairly considers each factor and articulates justifications for consideration or elimination of each factor, is the suggested approach for a more consistent application of the Reid Factors.

It is further recommended that when the Reid Factors are applied to a moral rights inquiry the courts give the artistic control/freedom factor more weight, in light of the purposes of VARA. The more creative control an artist has over the work, the stronger her claims are for protection of her creation. If the purpose of VARA includes protecting an artist's personality, while also preserving national culture, the courts should be inclined to give this factor more

178. The Second Circuit's *Aymes* approach, as applied, does not encourage the articulation and justification for each Reid Factor. By setting out the five standard "significant" factors to almost any case, the Second Circuit does not give sufficient consideration to other Reid Factors. Furthermore, as illustrated in *Carter*, the five factors articulated in *Aymes* will not always be the most significant factors to every case.

emphasis in its decision on moral rights.¹⁷⁹ The courts should further tailor the Reid Factors in a moral rights determination to recognize VARA's goals.

There is a downside, though, to giving artistic control greater weight. Such an approach may encourage hiring parties to restrict their hired party's artistic freedom to avoid VARA protection. One commentator notes that restraint on artistic freedom could result in "plot art" which no one likes and no one would fight to preserve."¹⁸⁰ Recognizing this potential result, it is recommended that courts give artistic freedom consideration, as well as, reviewing the other factors. Thus, the tailored approach, while mindful of the purpose of moral rights, should include a review of each factor.

The tailored approach, even when considering moral rights, is still unsatisfactory. The Reid Factors, by themselves, do not alleviate the preemptive effect a work made for hire finding has on an artist's moral rights. Under the current statute, this clash between the economic rights of an employer and the moral rights of a visual artist-employee will *always* sacrifice the latter's rights. Thus, the more effective way to root-out this preemptive effect is through legislative action, not judicial tests and factors. The final section suggests changes to VARA which would help to recognize and to protect moral rights for visual artist-employees.

C. VARA Revised: Recognizing Moral Rights in Employee Visual Artists

As VARA currently stands, works made for hire are categorically excluded from moral rights protection.¹⁸¹ The two doctrines are not incompatible in theory¹⁸² and could exist harmoniously in practice. Thus, this Article advocates recognizing the moral rights of

179. See 136 Cong. Rec. 12,607-08 (1990). (noting the goal of preserving artists' personal rights to maintain the "integrity of our culture").

180. Thomas F. Berner, *Bad Laws Make Hard Cases*, N.Y. L.J., March 29, 1995, p. 2.

181. See *supra* notes 73-75 and accompanying text.

182. See *supra* Introduction for the illustration that the two rights theoretically exist in harmony.

employee-visual artists.

This advocated approach only addresses the narrow, specific category of works currently protected under VARA. The limited works protected and the hurdles that an artist must overcome to make out a claim for moral rights limit the application of this approach. This narrow application furthers the goals of VARA¹⁸³ while remaining consistent with the theory of copyright protection.¹⁸⁴

The current state of VARA protection is based on the firmly entrenched policy of rewarding and protecting financial investments in works of art. The argument therefore goes that works made for hire are excluded from moral rights protection to reward employers (and not their employees) for assuming a financial risk in production of a copyrightable work. However, this rationale for barring visual artist-employee's from their moral rights ignores the very definition of the right: moral rights exist *independently* of economic rights. Therefore, an employer can realize its economic reward simultaneously with the recognition of the creator-employee's right to attribution or integrity.

The visual artist-employee's right to attribution should be recognized once the art has been displayed for public viewing.¹⁸⁵ For example, the law should grant moral rights protection to an artist-employee who wishes to have her name removed from her publicly displayed work which has been physically altered.¹⁸⁶ The public display requirement would protect the employer's right to direct the work while the work is in production. Thus, once a work has been publicly displayed, an artist's honor or reputation can be impacted by a modification. As illustrated, there would be no interference of the employer's economic right by recognizing an artist-employee's right to attribution (or, in this case, removal of her name).¹⁸⁷

183. See *supra* note 48 for the dual goals of VARA: to protect the artist's personality while maintaining the integrity of our country's culture.

184. See *supra* note 7 (noting the copyright goal in providing financial incentives to create).

185. Damich, *supra* note 11, at 988.

186. See *supra* notes 44-45 and accompanying text for definition of right of attribution.

187. This illustration also applies to an artist-employee's right to have her name attached to the work once the work is publicly displayed.

The law should also recognize an artist-employee's right to integrity for publicly displayed works.¹⁸⁸ In fact, since the right of integrity is the "most compelling case for moral rights protection" because it protects irreplaceable works from modification or destruction, the safeguarding of this right is essential to recognizing moral rights at all.¹⁸⁹ The right to prevent modification of a work of visual art should be granted to the artist-employee once the court finds that such alteration will result in prejudice to the artist's honor or reputation.¹⁹⁰ This approach will preserve the sanctity of visual art, while discouraging employers from making changes to the art that they could have made before the work was publicly displayed.

The right to prevent destruction of an irreplaceable work of art presents the most compelling case for recognizing the artist's moral rights claim. By definition, once an employer decides it wants to destroy the work, it is no longer looking towards that work for copyright enjoyment. Thus, the strong policy consideration for protecting the employer's economic rights is eliminated, and an artist should be allowed to preserve her work from destruction.

There is undoubtedly a more complicated issue when the art in question is "site-specific" or, as in *Carter*, incorporated into the building.¹⁹¹ Although the employee has a strong right in the control it can exercise over the work, absent a waiver, the artist-employee should be granted the right to protect the work deemed of "recognized stature."¹⁹² Furthermore, this right shall only be protected for the life of the artist-employee and thus, not a permanent restraint on the employer's control.¹⁹³

This advocated approach, while not fully preserving either the employer's economic right or an artist-employee's moral rights,

188. The public display requirement should exist for the same reasons that it does for the right of attribution. The employer must be given protection for all direction and control over the work until the work is on display for the viewing public. Public display may not necessarily correspond with completion of the work.

189. Damich, *supra* note 11, at 950.

190. *See supra* note 51.

191. Thus modification or removal would destroy the work.

192. *See supra* note 52.

193. *See supra* note 39 and accompanying text.

would serve the purposes of both the Copyright Act and VARA.¹⁹⁴ The law encourages the financing to produce works, while moral rights theory protects the artist's creativity and skill from exploitation. Thus, a "compromise" in approaches will realize both of these equally important policies. It is time give moral rights the recognition and protection these rights receive in most Berne Convention countries.

CONCLUSION

VARA was an important first step for the United States in recognizing its artists' claims to their moral rights. However, this legislation is not in compliance with the Berne Convention and only provides moral rights in very limited circumstances. This limitation is impacted by VARA's categorical exclusion of works made for hire from moral rights protection. Thus, the work made for hire determination has profound consequences for the artist in recognizing her moral rights.

The outcome of *Carter v. Helmsley-Spear* demonstrates the weaknesses in VARA and the shortcomings of the Reid Factors. The highly discretionary Reid Factors are currently producing inconsistent results among and within the circuits. Therefore, a tailored approach to the Reid Factors, while mindful of vindicating the purposes of VARA and remaining faithful to the agency principles, is advocated until VARA can be amended to recognize the moral rights of employee-visual artists. Legislative action is the only way to root-out the preemptive effect a work for hire finding has on an artist's moral rights. The compromise advocated in this Article is an effective and fair way to harmonize the economic right with the moral right in a work made for hire.

194. Professor Roberta Rosenthal Kwall advocates that VARA be amended to reflect a "reasonableness" standard for works made for hire instead of the current flat exemption. Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 11 (1997). She recommends a balance-of-the hardships approach. *Id.* For example, Professor Kwall suggests that the statute should allow a court to weigh the artist's exercise of her moral rights against the expected economic damage of the employer if the artist exercises these rights. *Id.*